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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ASUS COMPUTER INTERNATIONAL; and ASUSTEK COMPUTER INCORPORATED,

Plaintiffs,

vs.

INTERDIGITAL, INC.; INTERDIGITAL COMMUNICATIONS, INC.; INTERDIGITAL TECHNOLOGY CORPORATION; IPR LICENSING, INC. and INTERDIGITAL PATENT HOLDING, INC.,

Defendants.

Case No. 15-cv-01716-BLF

PLAINTIFFS' MOTION TO EXCLUDE DEFENDANTS' EXPERTS' IMPROPER TESTIMONY

Hearing Date: February 14, 2019
Time:
Location: Courtroom 3, 5th Floor
Judge: Hon. Beth Labson Freeman

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Plaintiffs ASUS Computer Int'l and ASUSTEK Computer Inc. ("ASUS") move to exclude Defendants InterDigital, Inc., InterDigital Communications, Inc., InterDigital Tech. Corp, IPR Licensing, Inc. and InterDigital Patent Holding, Inc. ("IDC") from offering improper legal opinions.

Through expert opinion, IDC attempts to stilt far-fetched legal theories and strained FRAND contentions. "A layman, which is what an expert witness is when testifying outside his area of expertise, ought not to be anointed with ersatz authority as a court-approved expert witness for what is essentially a lay opinion." *White v. Ford Motor Co.*, 312 F.3d 998, 1008-09 (9th Cir. 2002), *opinion amended*, 335 F.3d 833 (9th Cir. 2003). As detailed below, IDC's experts improperly opine on legal matters, opine on decisions that are not law even in the jurisdiction in which they originally issued, offer hedonic regression analysis premised (mistakenly) on data that its experts testified would be inappropriate, opine on general economic theory that they do not apply to the facts of this case, and testify outside their expertise. IDC experts each simply reach too far.

A. Legal Standard

Federal Rule of Evidence 702 provides that a qualified expert may testify if "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed.R.Evid. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589-90 (1993). Thus, expert testimony may only be admitted into evidence if (1) the witness qualifies as an expert; (2) the methodology by which the expert reaches his or her conclusions is sufficiently reliable; and (3) the expert's testimony will assist the trier of fact to understand the evidence or determine a fact in issue. *Id.*. IDC must prove, by a preponderance of the evidence, that Dr. Layne-Farrar's, Dr. Putnam's, and Dr. Huber's testimony meets the reliability requirements of Rule 702. *Id.* at 592 n.10; FRE 702, Advisory Committee Notes, 2000 Amendment. For the reasons set forth below, several portions of those experts' proffered testimony do not.

B. Dr. Layne-Farrar's Improper Opinions

ASUS moves to exclude Dr. Layne-Farrar's testimony on third-party technical analyses,

ASUS's licensing with third parties, and volume discounts because her testimony fails to satisfy the prerequisites set forth in the Federal Rules of Evidence, as demonstrated below.

1. Improper Character Evidence Regarding [redacted]

The Court should exclude IDC's attempt to use Dr. Layne-Farrar to introduce improper character evidence on ASUS's licensing with third party SEP holders. At issue in this Motion is [redacted] Ex. 2,[1] Layne-Farrar RR ¶¶ 19, 20, 21, 375-377, Appendixes D, H. She engages in conclusory speculation [redacted] *See* Ex. 2, Layne-Farrar RR ¶ 20 & nn. 14-15. Her opinions on this subject cite no evidence, lack in foundation, are not based on any expert analysis, and are irrelevant to the issues in this case.

Dr. Layne-Farrar's deposition makes clear that she came to her opinions on ASUS's third-party license negotiations [redacted] She admittedly did not [redacted] Ex. 1, Layne-Farrar Dep. Tr. at 202:10-20, 203:1-11. She could not determine whether [redacted] *Id.* at 195:723. She was unable to say whether [redacted] *Id.* 203:3-11. She could not say [redacted] *See id.* at 183:20-184:8, 192:5-24 [redacted]; 192:25-193:10, 198:1-21 [redacted]; 198:22-200:13 [redacted]; 200:14-24 [redacted]. She admitted [redacted] *Id.* at 202:10-20.

In addition to lacking meaningful evidentiary underpinnings, Dr. Layne-Farrar's opinions are not "the product of reliable principles and methods … applied … reliably to the facts of the case." Fed. R. Evid. 702(c)-(d). Nothing in her training as an economist qualifies her to evaluate whether

[1] All "Ex." Citations herein refer to the exhibits attached to the Declaration of Michael R. Franzinger in Support of ASUS's Motion for Summary Judgment. All expert opening reports are abbreviated as "OR", rebuttal reports are "RR", and deposition transcripts are "Dep. Tr.".

[redacted] Her opinions in these sections do not employ economic terms and techniques. They are attorney-style, lay factual argument that should not be given a veneer of credibility by being routed through an expert. *Stathakos v. Columbia Sportswear Co.*, No. 15-CV-04543-YGR, 2018 WL 1710075, at *5 n.6 (N.D. Cal. Apr. 9, 2018) ("Opinions on legal issues are properly the subject of attorney argument, not expert testimony.") .

Finally, this evidence is inadmissible under other Federal Rules. *See* Fed R. Evid. 401 & 402. It is irrelevant, and thus inadmissible, because the case is about the licensing negotiations between IDC and ASUS, [redacted] *See Daubert*, 509 U.S. at 597 (expert testimony must be "relevant to the task at hand"). The licenses with [redacted] and Dr. Layne-Farrar does not analyze how [redacted] *See, e.g.*, Ex. 2, Layne-Farrar RR Appendix H, p. 260 [redacted]. Rather than addressing any salient issue, the [redacted] *Id.* ¶¶ 20, 21. This kind of propensity evidence is barred. Fed. R. Evid. 404(a)(1) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."). It also lacks the specificity and repetitiveness to be admissible under Rule 406's "habit" exception, which "refers to the type of nonvolitional activity that occurs with invariable regularity." *Weil v. Seltzer*, 873 F.2d 1453, 1460 (D.C. Cir. 1989) (district court abused discretion by admitting "habit" of "prescrib[ing] steroids to other allergy patients while representing the drugs to be antihistamines or decongestants"); *see also Simplex, Inc. v. Diversified Energy Sys., Inc.*, 847 F.2d 1290, 1293-94 (7th Cir. 1988) (affirming exclusion of evidence of a company's "late and inadequate performance of other contracts" and distinguishing "habit" cases as "involv[ing] specific, particularized conduct capable of almost identical repetition"); *Scott v. Am. Broad. Co.*, 878 F.2d 386, at *3 (9th Cir. 1989) ("Rule 406 may be invoked only where a high degree of specificity and frequency of uniform response is present.").

In summary, [redacted] serve no legitimate purpose, but only function to [redacted] They do not reflect the professional analysis of an economist. Because all of these opinions are unsupported by genuine facts or data, are not the product of reliable methods used by experts in the field, and are improper and irrelevant propensity evidence, they are inadmissible and she should not be permitted to testify to the opinions in paragraphs 19-21, 375-377, and Appendixes D and H of her report. Thus, the Court should exclude Dr. Layne-Farrar from testifying about [redacted]

2. Improper Generalizations Regarding [redacted] to IDC's Conduct

Dr. Layne-Farrar's generalized, irrelevant testimony [redacted] should be excluded. Rule 702 "assign[s] to the trial judge the task of ensuring that an expert's testimony is … relevant to the task at hand." *Daubert*, 509 U.S. at 597. The central issue in this case is whether IDC complied with its FRAND obligations to ETSI, and the analysis of IDC's licensing program, [redacted], must be viewed through that lens. Yet, Dr. Layne-Farrar opines on the appropriateness of [redacted] as a general licensing practice and in (non-ETSI) patent pools. She provides no discernible link between these opinions and ETSI's FRAND obligations or IDC's specific conduct.

First, Dr. Layne-Farrar provides four justifications for [redacted] Ex. 2, Layne-Farrar RR ¶¶ 99-110; Ex. 1, Layne-Farrar Dep. Tr. 136:22-138:12, 140:11-142:3, 144:21-145:14, 152:17-25, 155:5-157:8 [redacted]; *see id.* 13:5-13 [redacted]. According to IDC, Dr. Layne-Farrar opines that economic justification for [redacted] are "(i) welfare enhancement enabling innovators to recoup their R&D investments; (ii) reduction of transaction costs; (iii) reduction of patent license monitoring and enforcement costs; (iv) enhancing wide dissemination of standards via market maker effects; and (v) aligning SDO members' incentives to increase adoption and expand output, benefiting consumers." Dkt No. 258-4 at 25 (citing Dkt No. 258-6, Layne Farrar Decl. ¶¶ 27-32); *see* Ex. 2, Layne-Farrar

RR ¶¶ 99-110. Dr. Layne-Farrar opines that based on these justifications, [redacted] Ex. 2, Layne-Farrar RR ¶ 109. However, Dr. Layne-Farrar economic theory for justifications is too abstract to aid the trier of fact. *Id.* ¶¶ 99-110; Ex. 1, Layne-Farrar Dep. Tr. 13:5-13, 136:22-138:12, 140:11-142:3, 144:21-145:14, 152:17-25, 155:5-157:8. Dr. Layne-Farrar does not apply the economic justifications to the facts of this case—[redacted] Federal Rule of Evidence 702 permits expert testimony only where "the expert has reliably applied the principles and methods to the facts of the case." Fed.R.Evid. 702; *Finjan Inc. v. Blue Coat Sys., Inc.*, No. 13-cv-03999-BLF, 2015 WL 4272870 (N.D. Cal. July 14, 2015) (opinion lacks probative value without being tied to facts of the case) (collecting case law).

Separately, Dr. Layne-Farrar relies [redacted]" Ex. 2, Layne-Farrar RR ¶ 109. But, it is the role of [redacted] in *IDC's ETSI* FRAND-encumbered licensing program that is disputed as violating IDC's FRAND obligations. *See, e.g.*, Ex. 4, Huber Dep. Tr. 63:6-67:4 [redacted]. Failing to tie expert opinions to the facts of this case render those opinions of little probative value. *See Daubert*, 509 U.S. at 591 (question is one of "fit" – "whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute."); *Finjan Inc.*, 2015 WL 4278270, *8 (N.D. Cal. 2015). Here, Dr. Layne-Farrar's [redacted] opinions (found at, *e.g.*, ¶¶ 99-110 of her report) simply do not fit the facts at issue in this case and therefore must be excluded because they will confuse, rather than help, a jury.

3. Economist's Improper Legal Testimony Regarding Parties Arbitration

Dr. Layne-Farrar's testimony regarding the IDC-ASUS arbitration should be excluded. IDC offers Dr. Layne-Farrar as an economist. In her report, though, Dr. Layne-Farrar [redacted] *See, e.g.*, Ex. 2, Layne-Farrar RR ¶¶ 13, 14-17, 31, 218, n.292, 263,

285, 290, 320, 374, 380, 389, 416; Ex. 2, Layne-Farrar Dep. Tr. at 177:2-17. Not only is legal opinion the province of the Court, but also Dr. Layne-Farrar's opinion is legally incorrect.

Dr. Layne-Farrar's report includes numerous examples of improper opinions [redacted] She opines that [redacted] Ex. 2, Layne-Farrar RR ¶ 13. Dr. Layne-Farrar then goes on to detail the [redacted] *Id.* ¶ 15. She interprets the [redacted] " *Id.* ¶¶ 16, 290; *see id.* ¶¶ 31, 263.

"Expert testimony is not proper for issues of law." *Crow Tribe*, 87 F.3d at 1045. "Experts 'interpret and analyze factual evidence. They do not testify about the law....' " *United States v. Brodie*, 858 F.2d 492, 496 (9th Cir.1988), *overruled sub nom U.S. v. Morales*, 108 F.3d 1031 (9th Cir. 1997) (quoting *United States v. Curtis*, 782 F.2d 593, 599 (6th Cir.1986)); *see also* Fed.R.Evid. 702 ("(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue…"). In setting out the [redacted], Dr. Layne-Farrar crosses into the province of the Court. Additionally, such prior legal opinions are inadmissible evidence and therefore cannot be opined on by experts at trial. *Smart Mktg. Grp., Inc. v. Publications Int'l, Ltd.*, No. 04-C-146, 2014 WL 625321, at *3–4 (N.D. Ill. Feb. 18, 2014) (rejecting prior appellate opinion as evidence and precluding experts from discussing same).

Indeed, by its express language, the [redacted] irrelevant to this proceeding on ASUS's FRAND-based claims. [redacted] Dkt. No. 135-4 ("FA") ¶ 109 (emphasis added). Dr. Layne-Farrar

admitted as much at her deposition. Ex. 1, Layne-Farrar Dep. Tr. 28:25-30:17 ("[redacted]").

Dr. Layne-Farrar's mischaracterizations and manipulations of the [redacted] demonstrate the prejudice that would befall ASUS and confusion inflicted on the jury if an expert were permitted to testify regarding the [redacted]. *See VirnetX Inc. v. Apple Inc.*, No. 6:12-CV-855, 2016 WL 4063802, *5 (E.D. Tex. July 29, 2016) ("describing a prior verdict before a jury often prejudices a party," "may have an unfair prejudicial effect when it is discussed in depth with multiple witnesses" and "creates the possibility that the jury will defer to the earlier result and thus will, effectively, decide the case on evidence not before it" (quoting *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1351 (3d Cir. 1975))); *Engquist v. Oregon Dep't of Agric.*, 478 F.3d 985, 1009–10 (9th Cir. 2007), 553 U.S. 591 (2008) (affirming district court's decision to exclude evidence of prior verdict against defendants); *Apple, Inc. v. Samsung Elec. Co.*, No. 12-cv-00630, 2014 WL 794328, *8-*9 (N.D. Cal. Feb. 25, 2014) (excluding expert's testimony on settlement because of risk of prejudice was high and admission would undermine public policy in favor of settlements, which is akin to public policy favoring arbitration). For example, she testified that [redacted] *Compare* Ex. 1, Layne-Farrar Dep. Tr. 29:23-30:10, *with* FA ¶¶ 9, 67. And she admitted she had no more than a layperson's understanding [redacted] Ex. 1, Layne-Farrar Dep. Tr. 32:22-34:3.

Dr. Layne-Farrar's offering of an opinion regarding the parties' [redacted] is improper and should be excluded.

4. Economist's Improper Reliance on [redacted] of Experts That Submitted No Report

Dr. Layne-Farrar improperly presents technical expert opinions of third parties who did not submit expert reports in compliance with Federal Rule of Procedure 26 and whose work was not

carried out for her or any other IDC expert witness in this case. Accordingly, the Court should find such testimony improper and unreliable.

Dr. Layne-Farrar, an economist, relies on [redacted] Dr. Layne-Farrar acknowledged she did not have the [redacted] Ex. 1, Layne-Farrar Dep. Tr. at 48:10-12 (Q. [redacted].

Based on [redacted] Dr. Layne-Farrar opines "[redacted] Ex. 2 at ¶ 142. Thus, while [redacted] *Id*. By her own terms, [redacted]

Having Dr. Layne-Farrar present these opinions is also impermissible procedural corner-cutting. To the extent IDC sought to prove there were [redacted] IDC should have submitted expert reports in discovery presenting [redacted] for that purpose. *United States v. Marine Shale Processors*, 81 F.3d 1361, 1370 (5th Cir. 1996) ("the financial and other incentives of litigation [may] pose an unacceptable risk to the objectivity and neutrality" of the non-testifying expert, thereby suggesting "the usefulness of cross-examination"). IDC's [redacted] do not do so.

Federal Rule of Civil Procedure 26(a)(2)(B) required the parties to provide a written report with "a complete statement of all opinions the witness will express and the basis and reasons for them…." *See also Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). The Court's April 12, 2018 scheduling order required the parties exchange reports no later than June 12, 2018, under Fed. R. Civ. P. 26(a)(2)(D). Federal Rules of Evidence 703 does not permit an expert witness to circumvent the rules of hearsay by testifying to the opinions of other

experts. *See Tokio Marine & Fire Ins. Co. v. Norfolk & Western Ry. Co.*, 172 F.3d 44 (4th Cir. 1999) (Unpub. Disp.) ("one expert may not give the opinion of another expert who does not testify"). If IDC wished to [redacted] it could have submitted [redacted] But IDC chose instead to direct its [redacted].[2] Any expert submitting a report would have been subject to cross examination, which is particularly important in expert discovery. As none of the [redacted] Dr. Layne-Farrar prejudices ASUS.

Furthermore, "[a] scientist, however well credentialed [s]he may be, is not permitted to be the mouthpiece of a scientist in a different specialty." *Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 614-615 (7th Cir. 2002) (excluding expert testimony that relied upon undisclosed expert analysis of another where it was clear that the testifying expert "lack[ed] the necessary expertise to determine whether the techniques were appropriately chosen and applied"); *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992) ("[T]he judge must make sure that the expert isn't being used as a vehicle for circumventing the rules of evidence. . . . [I]t is improper to use an expert witness as a screen against cross-examination."); *TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722, 732 (10th Cir. 1993) (excluding expert's reliance on opinions of non-testifying expert where there was "no indication in the record that [the expert] had any familiarity with the methods or reasoning used" in reaching the non-testifying expert's opinions). Accordingly, the Court should exclude Dr. Layne-Farrar's testimony on [redacted], as provided in paragraphs 141-146 and footnotes 203 and 401 of her report.[3]

[redacted]. Economist's Improper Legal Opinions on [redacted]

Dr. Layne-Farrar opines on [redacted]

[2] Dr. Layne-Farrar does not rely on IDC's technical expert reports in the opinions challenged here.
[3] ASUS has endeavored to specify each of the instances of the improper opinions in the reports. However, this Motion should be understood to seek preclusion of the identified expert subject matter altogether, including any additional instances of the same subject matter not identified by individual paragraph number.

[redacted] For instance, Dr. Layne-Farrar that IDC [redacted] in forming her opinion. Ex., Layne-Farrar RR ¶ 39 & n.48, *see also id.* ¶¶ 42 (opining [redacted] 63 (opining [redacted]"); *id.* ¶¶ 70, 151-54; Appendix E (opining [redacted]).

For the reasons detailed in in Section D.1 below, the Court should preclude Dr. Layne-Farrar from opining on [redacted] because (1) it is improper for experts to opine on the law, (2) the ITC [redacted], essentially vacating the decision; (3) [redacted] precludes its reliance on them now.

C. **Dr. Putnam's Improper Opinions**

IDC offers Dr. Putnam as an economics expert. ASUS moves to exclude Dr. Putnam's expert testimony on [redacted] because his testimony fails to satisfy the prerequisites set forth in the Federal Rules of Evidence as demonstrated below.

1. Economist's Improper Legal Opinions on International Trade Commission Decisions

Dr. Putnam expends significant effort grafting onto this case vacated Initial Determinations from IDC's prior ITC investigations to which ASUS was not a party. Ex. 7, Putnam RR at ¶¶ 349, 361-87, FRAND Appendix ¶¶ 137-161, 167. As detailed below, the Court should exclude such opinions because (1) it is improper for experts to opine on the law, (2) the ITC did not adopt the ALJ's "initial" decisions on which IDC relies, essentially vacating the decision; (3) IDC's refusal to produce discovery relating to these ITC proceedings precludes its reliance on them now.

Dr. Putnam interprets the "initial" determinations in (1) ITC Inv. No. 337-TA-800 (the "800 Investigation"); (2) ITC Inv. No 337-TA-868 (the "868 Investigation") and (3) ITC Inv. 337-TA-613 (the "613 Investigation"). In these investigations, IDC asserted Samsung, Nokia, Huawei, and ZTE

infringed over 10 IDC patents. Dr. Putnam now opines [redacted]. Ex. 7, Putnam RR ¶¶ 77-84, 361-385, FRAND Appendix ¶¶138-161; Exhibit 7. For instance, Dr. Putnam opines that the [redacted] *Id.* at ¶ 367. Dr. Putnam goes on to describe the allegations of the parties, interpret the initial determination's findings and holdings as [redacted] *Id.* at ¶ 365-385.

Dr. Putnam's opinion exceeds the permissible scope of expert opinion. He improperly opines on the ITC law. "Experts 'interpret and analyze factual evidence. They do not testify about the law....' " *United States v. Brodie*, 858 F.2d 492, 496 (9th Cir.1988) (quoting *United States v. Curtis*, 782 F.2d 593, 599 (6th Cir.1986)); *see also* Fed.R.Evid. 702 ("(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue…"). On this basis alone, Dr. Putnam should not opine on the holdings of the 613, 800, and 868 ITC investigations.

By way of background, IDC filed multiple complaints against multiple parties, including Nokia, ZTE, Samsung, and LGE ("Respondents"). ASUS was not a party in those investigations and [redacted] Respondents urged the ITC that Public Interest should preclude an exclusion order prohibiting import of infringing products. In those investigations, the respondents argued that IDC's ETSI's FRAND commitments satisfied the ITC's Public Interest defense, were the Commission to find patent infringement. In all three ITC investigations, the Commission's *final* decision held no party infringed the asserted patents.

Important to this case, Dr. Putnam relies on preliminary, Administrative Law Judge (ALJ) "initial determinations." That is important because the ITC did not adopt the ALJ's public interest recommendation in any of the Investigations on which he relies. Specifically, the Commission determined to review either the public interest portion or the entire initial decision in the 613, 800, and 868 investigations, and ultimately determined not to adopt the ALJ's public interest recommendation. **In the 613 Investigation**, the Commission "determined to review the RID's public interest findings," and the Commission's final decision ruled that Commission's "findings of noninfringement render any consideration of public interest issues moot." Ex. 8, *In re Certain 3G*

Mobile Handsets, 337-TA-613 (Remand), Notice of Comm'n Dec to Review (June 25, 2015) (ordering review of public interest); Ex. 3, *In re Certain 3G Mobile Handsets*, 337-TA-613 (Remand), Comm'n Op. at n27, (Sept. 21, 2015). **In the 800 Investigation**, the Commission "determined to review the final ID in its entirety," and in its final decision the Commission took no position on public interest (i.e., RAND). Ex. 15, *In re Certain Wireless Devices With 3G Capabilities*, Notice of Comm'n Dec. to Review, 337-TA-800 at 3 (Sept. 4, 2013); Ex. 14, *In re Certain Wireless Devices With 3G Capabilities*, 337-TA-800, Comm'n Op. at 40 (Feb. 19, 2014) (not adopting public interest recommendation). **In the 868 Investigation**, after confirming no party infringed a valid patent, the Commission's Final Decision stated "Similarly, the Commission reviews and takes no position on the FRAND issues raised by the respondents concerning their affirmative defenses." Ex. 9, *In re Certain Wireless Devices With 3G And/Or 4G Capabilities*, 337-TA-868, Comm'n Notice at 3 (Aug. 14, 2014).

When the Commission orders review of an initial determination (or a subset of it), an initial determination becomes the Commission's determination only if the Commission expressly affirms an issue in the Commission's decision on review. *See* 19 C.F.R. § 210.42(h)(2); *Linear Tech. Corp. v. Int'l Trade Com'n*, 292 Fed. Appx. 52, 55 (Fed. Cir. 2008) (when the Commission determined to review an issue but "ended up taking on position on that issue," it "effectively vacat[ed] the ALH's determination" on that issue). The Commission did not affirm or adopt the ALJ's recommendation of public interest in any of IDC's ITC investigations.

Not only are these "initial determinations" now vacated, but they also have no binding effect to any district court. *Tex. Instruments Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1569 (Fed. Cir. 1996) ("ITC decisions are not binding on district courts in subsequent cases brought before them."). This Court has precluded reliance on initial determinations because of their preliminary nature. *See Realtek Semiconductor Corp. v. LSI Corp.*, No. C-12-03451-RMW, 2014 WL 46997, at *1 (N.D. Cal. Jan. 6, 2014) (granting motion in limine to preclude plaintiff from referencing the initial determination in an ITC action "because of the non-final nature of the ALJ's decision.").

As a practical matter, [redacted]

[redacted] IDC has [redacted] *See* Dkt No. 162 at 1-2. Having [redacted] IDC cannot now rely on the "initial" determinations in 868, 800 and 613 Investigations. *See Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (privileges may not be used "both as a sword and a shield.").

Accordingly, the Court should exclude opinion testimony from Dr. Putnam about the IDC's ITC 613, 800 and 868 Investigations.

2. Unreliable [redacted]

Dr. Putnam conducts [redacted] that is unreliable. Ex. 7, Putnam RR ¶¶ 269-282, Technical Appendix. The [redacted]

Dr. Putnam employs [redacted] Specifically, he [redacted] Ex. 7, Putnam RR ¶¶ 269. From his analysis [redacted] *Id.* [redacted] *Id.*

Dr. Putnam's [redacted] is unreliable because it [redacted] Ex. 10, Putnam Dep. Tr. 175:3-9. He [redacted]. *Id.* 175:10-19. Dr. Putnam admits that [redacted] *Id.* 175:10-19. Dr. Putnam [redacted], which is labeled "ASP" [redacted]

See, e.g., Ex. 7, Putnam RR, Technical Appendix pp. 9-10 (citing Ex. 11 [redacted]).[4] The taxonomy document for the IDC dataset defines ASP as the *retail* price. The ASP contains exactly the same [redacted]: "the average *end-user* (street) price paid…ASP includes all freight, insurance, and other shipping and handling fees… that are included in *vendor or channel pricing*…. Because ASP is an estimate of the final price by the average end users, it includes the *implicit channel markup embedded in the final price*." Ex. 12 at 5725 (emphasis added).

Thus, [redacted] unreliable. *See Univ. Coin*, 2015 WL 12001264, at *12-13 (excluding expert testimony on regression based on unreliable data);]"); *Intel*, 2010 WL 8591815, at *20–21 (excluding regression where expert used 2 days' data after testifying 6 days' data would be inadequate); *Madani v. Equilon Enter. LLC*, 2009 WL 2148664, at *11 (C.D. Cal. 2009) (similar). "The infirmities in the [redacted] are so fundamental that they do not merely go to the probativeness of Dr. [Putnam's] testimony but go to its admissibility as well." *Univ. Coin*, 2015 WL 12001264, at *12-13. "Any step that renders the analysis unreliable…renders the expert's testimony inadmissible," Fed. R. Evid. 702 Advisory Comm. Note, 2000 amend.

Accordingly, the Court should exclude testimony regarding Dr. Putnam's [redacted]

3. Generalizations Regarding [redacted] Is Impermissible Expert Opinion

Like Dr. Layne-Farrar, Dr. Putnam too provides generalized testimony about [redacted] that are untethered to the facts at issue here. Federal Rules of Evidence 702 "assign[s] to the trial judge the task of ensuring that an expert's testimony is … relevant to the task at hand." *Daubert*, 509 U.S. at 597. The central issue in this case is whether IDC complied with its FRAND obligations to ETSI, and the analysis of IDC's licensing program, [redacted] must be viewed through that lens. Yet, Dr. Putnam opines on [redacted]

[4] Due to the size of this raw data, only a sampling is attached to this motion for reference. __

First, Dr. Putnam's opines that [redacted] *E.g.*, Ex. 7 Putnam CRR ¶¶ 300-313. But none of these instances involve licensing, let alone the ETSI FRAND commitment.

Second, Dr. Putnam opines that [redacted] Ex. 7, Putnam RR ¶ 306. He then provides [redacted] *Id.* A trier of fact should not be left to speculate on how they should apply general theories [redacted] to this case, and lacking support, IDC has a clear intention of peppering the record with vagaries so that counsel can argue for broad, unsupportable speculation. Federal Rule of Evidence 702 permits expert testimony only where "(d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702; *Finjan Inc. v. Blue Coat Sys., Inc.*, 2015 WL 4278270, at *8 (N.D. Cal. 2015) (opinion lacks probative value without being tied to facts of the case) (collecting case law).

Similarly, Dr. Putnam identifies [redacted] Ex. 7, Putnam RR ¶¶ 317-321.

In IDC's [redacted] *See, e.g.*, Ex. 4, Huber Dep. Tr. 63:6-67:4 [redacted]. Moreover, that [redacted] Ultimately, Dr. Putnam does nothing to tie this analysis to ETSI's FRAND obligations [redacted] at issue in this case. *See Daubert*, 509 U.S. at 591 (question is one of "fit" – "whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute."); *Finjan Inc.*, 2015 WL 4278270, *8 (N.D. Cal. 2015).

4. Dr. Putnam's Improper Effort to Characterize

Like Dr. Layne-Farrar, IDC's counsel has Dr. Putnam engages in conclusory speculation that Ex. 7, Putnam RR ¶ 315; *see also id.* ¶¶ 335, 360. Thus, Dr. Putnam attempts to cast ASUS *Id*. He attempts to characterize Dr. Putnam engages in conclusory speculation of *Id.* ¶ 335. His opinions on this subject are lacking in foundation, not based on any expert analysis, and irrelevant to the issues in this case.

Deposition testimony in this case, specifically of IDC's expert Dr. Layne-Farrar, makes clear that Dr. Putnam lacks the foundation necessary to Ex. 1, Layne-Farrar Dep. Tr. at 202:10-20. She could not say whether *See id.* at 183:20-184:8, 192:12-24 ( ); 192:25-193:10 ( ); 198:22-199:13 ( ); 200:14-24). Dr. Putnam reviewed the same record as Dr. Farrar, and his opinion simply reaches too far, lacking evidence necessary to make an assessment as . By definition, his opinion cannot be "the product of reliable principles and methods … applied … [reliably] to the facts of the case." Fed. R. Evid. 702(c)-(d).

Even if Dr. Putnam had the foundation required to draw an opinion (which he did not), his opinion is inadmissible under other Federal Rules. This case is about the licensing negotiations between IDC and ASUS, . *See Daubert*, 509 U.S. at 597 (expert

testimony must be "relevant to the task at hand"). [redacted] *See, e.g.*, Ex. 7, Putnam RR ¶¶ 315, *see also id.* ¶¶ 335, 360. Rather than addressing any salient issue, the discussion of [redacted] *Id.* This kind of propensity evidence is barred. Fed. R. Evid. 404(a)(1) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."). It also lacks the specificity and repetitiveness to be admissible under Rule 406's "habit" exception, which "refers to the type of nonvolitional activity that occurs with invariable regularity." *Weil v. Seltzer*, 873 F.2d 1453, 1460 (D.C. Cir. 1989) (district court abused discretion by admitting "habit" of "prescrib[ing] steroids to other allergy patients while representing the drugs to be antihistamines or decongestants"); *see also Simplex, Inc. v. Diversified Energy Sys., Inc.*, 847 F.2d 1290, 1293-94 (7th Cir. 1988) (affirming exclusion of evidence of a company's "late and inadequate performance of other contracts" and distinguishing "habit" cases as "involv[ing] specific, particularized conduct capable of almost identical repetition"); *Scott v. Am. Broad. Co.*, 878 F.2d 386, at *3 (9th Cir. 1989) (Unpub. Disp.) ("Rule 406 may be invoked only where a high degree of specificity and frequency of uniform response is present.").

The Court should exclude Dr. Putnam's testimony [redacted]

5. Economist's Improper Legal Testimony Regarding [redacted]

As detailed in Section C.3 above, the Court should exclude Dr. Putnam from testifying about [redacted] In his report, and mimicking Dr. Layne-Farrar, Dr. Putnam interprets [redacted] claims of this case. *See, e.g.*, Ex. 7, Putnam RR ¶¶ 14, 52, 89-95, 161, n.185, 194, 229, 359, FRAND appx n.65. At bottom, Dr. Putnam "analysis" of the [redacted]

[redacted] *Id.* ¶ 95. IDC is having Dr. Putnam, serving as an economic expert, supplanting the Court's role by providing legal opinion.

For all the reasons detailed in Section [redacted] for Dr. Layne Farrar, the Court should exclude Dr. Putnam's discussion [redacted] First, as discussed in Section C.3, the [redacted] As Dr. Putnam himself is aware, by its express language, [redacted] FA ¶ 109 (emphasis added). Dr. Putnam himself [redacted] Ex. 13, at 837:25-838:3.

Second, experts are not permitted to opine on the law. *Crow Tribe*, 87 F.3d at 1045. "Experts 'interpret and analyze factual evidence. They do not testify about the law....'" *United States v. Brodie*, 858 F.2d at 496 (quoting *United States v. Curtis*, 782 F.2d 593, 599 (6th Cir. 1986)); *see also* Fed. R. Evid. 702 ("(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.…"). IDC improperly seeks to have its economists duplicate, with the veneer of expert approval, IDC counsel's strained preclusion argument raised in summary judgement.

Finally, Dr. Putnam's mischaracterizations and manipulations [redacted] demonstrate the prejudice that would befall ASUS and confusion inflicted on the jury if these experts were permitted to testify regarding the Final Award. *See VirnetX*, 2016 WL 4063802, at *5 ("describing a prior verdict before a jury often prejudices a party," "may have an unfair prejudicial effect when it is discussed in depth with multiple witnesses" and "creates the possibility that the jury will defer to the earlier result and thus will, effectively, decide [the] case on evidence not before it" (quoting *Coleman Motor*, 525 F.2d at 1351); *Engquist*, 478 F.3d at 1009–10; *Apple*, 2014 WL 794328, *8-*9 (excluding expert's testimony on settlement because of risk of prejudice was high and admission would undermine public policy in favor of settlements, which is akin to public policy favoring arbitration).. For example, blatantly [redacted]

[redacted] Dr. Putnam now opines about [redacted]"" Ex. 7, Putnam RR ¶ 14 (emphasis added); *see also* Ex. 10, Putnam Dep. Tr. 192:18-193:12 [redacted]).

Accordingly, the Court should preclude Dr. Putnam from discussing the arbitration between ASUS and IDC.

D. Dr. Bertram Huber's Improper Opinions

IDC offers Dr. Huber as an expert on the ETSI IPR Policy. ASUS moves to exclude Dr. Huber's testimony on issues outside that topic, namely economics, French law, antitrust and ETSI SEP licensing practices because his testimony fails to satisfy the prerequisites set forth in the Federal Rules of Evidence as demonstrated below.

1. Dr. Huber Is Not an Expert in Economics, French Law, or Antitrust

The Court should exclude Dr. Huber's testimony outside the scope of his expertise, which is ETSI's IPR policy and history. In purporting to rebut ASUS's experts on French law, economics and antitrust, his report strays into areas well outside of that subject matter. *See* Ex. 6, Huber RR pp. 3-4 [redacted] *id.* ¶¶ 73-83, 85-101, 108-109, 112-114, 116-118, 123-126, 136-138, 158-160, 166-173.[5] A witness providing expert testimony must be "qualified as an expert by knowledge, skill, experience, training, or education" and cannot make expert conclusions outside his area of expertise. FRE 702. During his deposition, Dr. Huber [redacted]. Ex. 4, Huber Dep. Tr. 6:22-8:4, 29:9-21; Ex. 5, Huber OR p.2. His testimony in these areas should be precluded under FRE 702.

Although Dr. Huber admittedly [redacted]. Ex. 6, Huber RR ¶¶ 73-101 [redacted]

[5] He also repeatedly references and relies [redacted] Ex. 6. Huber RR ¶¶ 59, 90, 103.

[redacted], 158-160 [redacted], 136-138 [redacted] 166-173 [redacted]. Dr. Huber opines [redacted] *See, e.g., id.* at ¶¶ 73-92, 123. He repeatedly challenges ASUS's experts' opinions as [redacted] *See, e.g., id.* at ¶¶ 93-101 (discussing and citing [redacted], 173. He proffers opinions of what "similarly situated" means "from an economic perspective." *See, e.g., id.* ¶ 158; *see generally id.* § 6.4. Before Dr. Huber can provide expert testimony [redacted] the Federal Rules of Evidence [redacted] FRE 702. Yet, both in his report and at deposition, he repeatedly admitted [redacted] Ex. 4, Huber Dep. Tr. 7:8-8:4; Ex. 6, Huber RR ¶ 168 ([redacted]). As an expert testifying outside his area of expertise, Dr. Huber should not be "anointed with ersatz authority as a court-approved expert witness for what is essentially a lay opinion." *See White v. Ford Motor Co.*, 312 F.3d 998, 1008-09 (9th Cir. 2002).

Similarly, Dr. Huber attacks ASUS's [redacted] *See, e.g.*, Ex. 6, Huber RR ¶¶ 111-114; *see generally id.* § 3. But, he admits that he is not an expert [redacted] Ex, 4, Huber Dep. Tr. 6:22-7:7. He also ventures [redacted] *See* Ex. 6, Huber RR ¶¶ 108-109 (asserting ASUS expert [redacted]). But he has not identified any education, training, or experience in [redacted] *See* Ex. 5, Huber OR at Ex. 1 (Dr. Huber's CV).

Yet, he improperly provides opinions in response to ASUS's experts in those areas. *Apple, Inc. v. Samsung Elecs. Co.*, 2013 WL 5955666, at *3 (N.D. Cal. Nov. 6, 2013) (precluding expert who admitted she was unqualified to testify on certain topics). He should not be allowed to testify in

the areas of [redacted]

2. Dr. Huber Is Not An Expert on [redacted]

Dr. Huber's testimony on [redacted] should be excluded because he lacks sufficiently demonstrated "knowledge, skill, experience, training, or education" to opine on that subject. FRE 702. Although he brings experience in [redacted] Ex. 6 [Huber RR] ¶ 6, he deviates from his [redacted] *Id.* ¶ 50. For example, he [redacted] Ex.6, Huber RR ¶ 154 [redacted]. He also [redacted] *Id.* ¶¶ 101, 123. Further, [redacted] *E.g.*, Ex. 6, Huber RR pp. 3-4, ¶¶ 50, 125, 139-157.

These opinions are replete with conclusory assertions relying on nothing but self-professed real-life experience. *See, e.g.*, Ex. 5, Huber OR ¶ 67 ("Based on my experience negotiating licenses in this industry…"), 70 ("normal commercial negotiation practice"; "not supportable by … industry practice"), 71 ("in line with general industry practice"); 72 ("the normal approach taken"). He claims without citation that [redacted] Ex. 6 [Huber RR] ¶ 56. He asserts that [redacted] *Id.* ¶ 60; *see also id.* ¶¶ 126, 159, 164-167. He devotes an entire section to [redacted] *Id.* § 4.1 (¶¶ 117-123). He does the same in rebutting Dr. Scott Morton's report. *Id.* § 6.3 (¶¶ 139-157); *see also id.* ¶¶ 132-22 [redacted]). Again and again, he engages in sweeping generalizations with

no cited support. *See, e.g.*, *id.* ¶ 164 [redacted].

The only basis he provides for his opinions on [redacted] *Id.* ¶ 118. Notably, his description of his qualifications does not identify ***any*** licensing experience under the IPR policies of ETSI. Ex. 5, Huber OR, § 1.1.

Dr. Huber's deposition testimony demonstrates that to the extent he has [redacted] For example, at deposition, he admitted that he [redacted] Ex. 4, Huber Dep. Tr. 19:24-21:18; *see State Contracting & Eng'g Corp. v. Condotte Am., Inc.*, 346 F.3d 1057, 1073 (Fed. Cir. 2003) (excluding expert lacking experience determining reasonable royalty for construction-related patents). He further testified that he was not [redacted]. Ex. 4, Huber Dep. Tr. 148:22-152:11. Thus, the only potentially [redacted] *Id.* 95:20-96:2; Ex. 6, Huber RR, Ex. 1 p.1. All [redacted] Beyond this irrelevant, [redacted] he cites [redacted]" as support. Ex. 4, Huber Dep. Tr. 95:3-9. That is far too speculative and imprecise to form the basis of expert opinion. *Applestein v. Medivation, Inc.*, 561 F. App'x 598, 600 (9th Cir. 2014) ("unattributed statement of an un-named colleague who allegedly heard defendants admit that the pills used in the Phase II study were unmatched" was an "uncredited and speculative conclusion[]" of an expert); *see also Bodum USA, Inc. v. A Top New Casting, Inc.*, No. 16 C 2916, 2017 WL 6626018, at *10 n.4 (N.D. Ill. Dec. 28, 2017) (rejecting as hearsay a witness's testimony that he "heard colleagues had talked to people" who ended up with counterfeit products). Worse yet, he compares [redacted]

[redacted] Ex. 4, Huber Dep. Tr. 19:7-23.

E. Conclusion

For the reasons stated above, ASUS moves to exclude as improper under FRE 702 the testimony of Dr. Ann Layne-Farrar regarding (1) [redacted] (2) v[redacted] (3) [redacted] (4) [redacted] and (5) IDC's [redacted]

ASUS also moves to exclude as improper under FRE 702 the testimony of Dr. Jonathan Putnam regarding (1) IDC's ITC Investigations and Initial Determinations, (2) [redacted] (3) [redacted] (4) [redacted] and (5) [redacted]

Finally, ASUS moves to exclude as improper under FRE 702 the testimony of Dr. Bertram Huber regarding (1) [redacted]

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By: */s/ Michael R. Franzinger*
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